OPINION
70-290

August 19, 1970 (OPINION)

Mr. Leslie R. Burgum

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Jamestown, ND

RE: Real Estate - Recording of Deeds - State Deed Need Not Be Acknow

This is in response to your letter of August 10, 1970, with regard to the interpretation of section 47-19-02 of the North Dakota Century Code.

You indicate that the register of deeds of your county is concerned about this statute and has raised the question as to whether or not deeds issued by the state of North Dakota, signed by the Governor and attested by the Secretary of State with the Great Seal affixed, are entitled to the benefits of said statutory provision although not specifically mentioned therein.

You call our attention to specific subsections of this statute providing for the recording of contracts between the state and a purchaser of school and institutional lands for the assignment of the same, but make no reference to a deed executed by the state. You mention discussing this matter with various state officers. You mention that the office of the Secretary of State ordinarily sends such deeds out without an acknowledgment but that when an acknowledgment is asked they attach the same.

We assume that the deeds which you mention are instruments following the requirement of section 54-01-05.1 of the North Dakota Century Code; that is, that such instruments are quit claim deeds executed in the name of the state of North Dakota by the governor and attested by the secretary of state.

We would further assume that the question turns primarily on section 47-19-03 of the North Dakota Century Code, which provides:

> PREREQUISITES TO RECORDING INSTRUMENTS. Before an instrument can be recorded, unless it belongs to a class provided for in sections 47-19-02 or 47-19-40, its execution must be established:
>
> 1. If executed by an individual, by acknowledgment by the person executing the same;
>
> 2. If executed by a corporation, by execution and acknowledgment by the person or persons authorized to execute instruments under sections 10-07-01 and 10-07-02;
>
> 3. By proof of a subscribing witness as is provided for by section 47-19-22;

4. By proof of the handwriting of the person executing an instrument and of subscribing witness thereto as is prescribed by sections 47-19-23 and 47-19-24 and filing of the original instrument in the proper office there to remain for public inspection."

In view of the holding of the Supreme Court in this state in American Manufacturing Company v. Mouse River Livestock Company, 10 N. D. 290, 86 N.W. 965, to the effect that the recording of an instrument not acknowledged as prescribed by statute does not operate as notice to the public, we would assume that a failure to comply with this statute where required can be a very serious matter.

It seems doubtful to us, however, that this statute applies to deeds issued by the sovereign state of north Dakota. Thus, we note the statement in 49 Am. Jur. 235, States, Territories and Dependences, Section 14, the following:

> OPERATION OF STATUTES AS TO STATES. The principle of English common law that where an act of Parliament is made for the public good, as for the advancement of religion and justice, or to prevent injury and wrong, the King is bound by such act, although not particularly named therein, but where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the King, the King is not bound, unless the statute is made to extend to him by express words, is equally applicable to our state governments. The state is not to be considered within the purview of a statute, however general and comprehensive the language of the statute may be, unless it is expressly named therein. General legislation is intended primarily for the subjects, and not for the sovereign. * * *"

We might mention further that in this state, the offices of governor and secretary of state are constitutional. The functions of such officers are generally understood, though in specific instances statutory provisions as to some of their functions, responsibilities and prerogatives have been enacted. It probably requires no statutory or constitutional citation to establish that the governor is the chief executive officer of the state. We note that subsection 2 of section 54-09-02 of the North Dakota Century Code requires the secretary of state to keep a register of and attest the official acts of the governor. Section 54-09-01 of the North Dakota Century Code charges him with the custody of all books, records, deeds, parchments, maps, and papers kept or deposited in his office pursuant to law.

On such basis it is not surprising that the method of proving execution of documents generally differs from that of most private documents. Thus we note that subsection 1 of section 31-09-10 of the North Dakota Century Code provides that the acts of the executive of this state may be proven by a copy of the records of the department of state hereof, certified by the head of such department. Subsection 41 of section 31-10-02 of the North Dakota Century Code provides for judicial notice "of the official acts of public officers." Subsection 9 of said section 31-10-02 provides for judicial notice of "the official signatures and seals of office of

the principal officers of the legislative, executive, and judicial branches of government of this state and of the United States."

Grants from the sovereign state of North Dakota differ in some respects from deeds of private conveyance. In practically all instances, the issuance of the deed in the first instance is pursuant to legislation for that purpose. You are undoubtedly aware of the great number of deeds issued pursuant to general statutes authorizing same in the general operations of such agencies of the state of North Dakota s the Board of University and School Lands and Bank of North Dakota. Also, in addition to general statutes authorizing extensive land dealings by some agencies of the state government, there are innumerable, special acts, providing for a particular conveyance of specifically described lands in particular instances. The statutory authorization for such conveyance is an essential part of the construction of any such deed in usual circumstances, and while such statute may be quoted or cited in the deed itself, such statutory authority is generally not recorded in the local register of deeds office.

We find at 45 Am. Jur. 450, Records and Recording Laws, section 55, the following (and other material):

> GENERALLY. Grants from the Sovereign are enrolled in the office from which they emanate. In England, grants are issued by the Lord Chancellor, after affixing the Great Seal of the United Kingdom to them; and a record is made of them in the court of chancery. In this country, grants from a state are ordinarily enrolled in the office of the secretary of state, and recorded in the county or district in which the lands lie. * * *"

We note also in 2 Patton on Titles, Second Edition, page 44, 45 section 296, the following statement:

> PUBLIC LANDS AND THE RECORDING ACTS. The acts of Congress, also the patents, approved lists, and certificates by which many grants are carried into effect, are of themselves "public records." A local record of them is therefore as unnecessary as it is ineffective to afford notice, determine priority, or to constitute evidence of title. However, since the term "record title" undoubtedly refers to a title shown by local records, it is both permissible and customary that these instruments, or certified copies thereof, should be recorded in the county where the land is situated. These records are given the same effect as evidence as the records of other conveyances. It is, however, quite generally held that the conveyances made by the patentee after he acquires an equitable interest by reason of a right to a patent are within the terms of the recording acts to the same extent as conveyances made by him after he acquires a legal title by issuance of the patent.
>
> As to state patents also, in the absence of provisions including them in the recording acts, they are not affected by these statutes, and registry in the state land office records is sufficient. However, in most states, the laws not only permit recording, as in the case of federal patents, but

> require that state patents, certificates of sale, and assignments of the latter be recorded the same as deeds, with like results to parties whose rights are based upon unrecorded instruments."

We note with interest that among the authorities cited for the last sentence of the above, is "North Dakota, North Dakota Revised Code 1953 Supplement 47-1902." While the cited section as to state patents could be construed to authorize recording, we find it difficult to construe same as to "require" local recording of state patents.

We note in 8 Thompson on Real Property, (Replacement Volume) 255, 256, section 4295, the following:

> Particularly where the concept of recording as constructive notice is based on the principle that the holder of the record title or outstanding interest is estopped to assert his interest as against a bona fide purchaser if he does not record, recording itself may not be constructive notice as against those not subject to estoppel. Conveyances by the federal government are not affected by state recording acts and take precedence according to time of execution regardless of failure to record. In the absence of statute the same is true of state conveyances. Federal tax liens are not subject to state recording acts. State recording statutes are not applicable to federal judgments except to the extent provided by Congress, and conveyances by the state are not subject to the recording acts in absence of statute. The statutes in regard to recording do not apply to conveyances by a state. Such conveyances may be recorded, and generally are, but their effect as vesting title and affording notice is not dependent upon their recording. A statute authorizing the recording of such conveyances without acknowledgment is permissive only; but where the statute requires the registration of a deed of land sold by the state for delinquent taxes, the record thereof becomes a condition precedent to the passing of title. Thus in some states, the priority of a tax deed is unaffected by conveyances by the original owner."

At the current time, of course, there is no question as to the right of the holder of a state patent or contract for patent to record same. Thus section 15-08-07 of the North Dakota Century Code, provides in part:

> * * * A contract of purchase in force may be recorded in the manner provided by law for recording of deeds of conveyance."

Section 15-08-17 of the North Dakota Century Code provides:

> PATENTS - RECORDING - EFFECT. The registers of deeds of the several counties are authorized to record all patents issued by the governor pursuant to the provisions of this title, and the record thereof shall have the same effect as the record of other conveyances executed according to the laws of this state."

The problem you discuss, however, probably relates to instruments other than those mentioned in these statutes.

We would assume that with regard to any of these patents, contracts, and any state deeds, it is at least questionable, as a matter of legal theory, whether recording in the local register of deeds office is necessary or effective to afford notice, determine priority, or to constitute evidence of title. As a practical matter, however, considering the usual practices in examining into the status of a title for purchase, sale, mortgage, lease, etc., by requesting an abstractor to prepare an abstract of the title, from primarily, the records of the local register of deeds office, it is unquestionably a great convenience to the title examiner, landowner, and others interested to have a local recording of these instruments. We would further assume that they have the right to demand recording of these instruments. Section 47-19-01 provides:

> INSTRUMENTS ENTITLED TO RECORD. Any instrument affecting the title to or possession of real property may be recorded as provided in this chapter."

Looking back to the provisions of section 47-19-03, it requires that the execution must be established by various methods prescribed therein. The signature of the state of North Dakota and its governor to an instrument is not under the laws of North Dakota really established by an acknowledgment before a notary public, or by a subscribing witness, in the usual sense of these terms. It is established by the attestation of the secretary of state and the affixing of the great seal of the state. Such attestation and sealing of the instrument does perhaps resemble to some extent, the acknowledgment by the governor of his signature before the officer authorized to accept such acknowledgment, and does to some extent resemble the secretary of state's witnessing the signature of the governor, but is actually on a differing basis. We would assume that such deeds so attested, do belong to the class provided for in section 47-19-02 including letters patent, duplicate final register's receipts, certificates from the United States land office, contracts between the state and purchaser of school and institutional lands, etc., though not specifically so designated in said section 47-19-02.

To the current date, we know of no decision of the Supreme Court of this state considering the question of whether a state deed, in addition to the attestation of the Secretary of State and affixing of the Great Seal of the state, should bear a certificate of acknowledgment of the signature thereto by a notary public, or whether such a deed properly recorded, does give constructive notice of its contents by reason, only, of being recorded in the local register of deeds office. Because of this fact, it seems probable that some individuals will continue to wish to have notarization of the signature to a state deed and we would not criticize what you indicate to be the policy of the secretary of state's office in regard to furnishing acknowledgments of signatures to state deeds upon request. On the other hand on the bases heretofore indicated, we feel a register of deeds would be in an untenable position if he would refuse to record a state deed, made out in accordance with the statutes authorizing same, signed by the governor, attested by the secretary of state and bearing the Great Seal of the State, on the

sole basis that the execution thereof is not "established" by acknowledgment before a notary public.

It is thus our opinion that a deed made out in accordance with the provisions of the statute authorizing same, signed by the governor, attested by the secretary of state, with the Great Seal of the state affixed thereto, is entitled to be recorded in the office of the Register of Deeds of the county or counties wherein the land is located, without further authentication or "establishment" of the execution of same. We hope the within and foregoing will be sufficient for your purposes.

HELGI JOHANNESON

Attorney General